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No. 06-792

In the Supreme Court of the United States

TOLEDO, PEORIA & WESTERN RAILWAY, PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Surface Transportation Board (STB) violated the Just Compensation Clause of the Fifth Amendment when, in light of significant volatility in the steel market, it calculated a railroad line's net liquidation value using a 16-month average of the price of steel, rather than the spot price of steel on the date that the line was sold.

2. Whether the STB's valuation methodology was inconsistent with the agency's prior decisions.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Borough of Columbia v. *STB*, 342 F.3d 222 (3d Cir. 2003) 10
Caddo Antoine & Little Mo. R.R. v. *United States*, 95 F.3d 740 (8th Cir. 1996) 3
GS Roofing Prods. v. *STB*:
143 F.3d 387 (8th Cir. 1998) 2
262 F.3d 767 (8th Cir. 2001) 3, 10
Iowa Terminal R.R. v. *ICC*, 853 F.2d 965 (D.C. Cir. 1998) 10
Kirby Forest Indus., Inc. v. *United States*, 467 U.S. 1 (1984) 5, 6, 9, 10, 11
United States v. *564.54 Acres of Land*, 441 U.S. 506 (1979) 8
United States v. *Commodities Trading Corp.*, 339 U.S. 121 (1950) 9
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) 8
United States v. *Miller*, 317 U.S. 369 (1943) 9

Constitution, statutes and regulation: Page

U.S. Const. Amend. V 5, 6
Just Compensation Clause 2, 7, 8
ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (49 U.S.C. 10101 *et seq.*) 2
49 U.S.C. 10502 2
49 U.S.C. 10903 2
49 U.S.C. 10907 2
49 U.S.C. 10907(b)(1) 3
49 U.S.C. 10907(b)(1)(A)(i) 3
49 U.S.C. 10907(b)(2) 3
49 U.S.C. 11101(a) 2
49 U.S.C. 11701-11704 2
Interstate Commerce Act, ch. 104, 24 Stat. 379 2
28 U.S.C. 2321(a) 5
28 U.S.C. 2342(5) 5
49 C.F.R. 1151.2(h) 3

Miscellaneous:

H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. (1980) ... 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-51) is reported at 462 F.3d 734. The initial decision of the Surface Transportation Board (STB or Board) (Pet. App. 83-132) is not yet reported. The Board's decision on reconsideration (Pet. App. 52-82) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2006. The petition for a writ of certiorari was filed on December 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenged the Board's valuation of a railroad line for purposes of a statutory forced sale. On

petition for judicial review, petitioner contended that the Board's valuation methodology violated the Just Compensation Clause of the Fifth Amendment. The court of appeals affirmed the Board's decision, holding that petitioner had waived its constitutional challenge and that the argument was without merit. Pet. App. 1-51.

1. Under the Interstate Commerce Act (the Act), ch. 104, 24 Stat. 379,[1] the Nation's railroads, though privately owned, have a common-carrier obligation to serve shippers on their lines. 49 U.S.C. 11101(a). To be relieved of that obligation for a particular line, a railroad must obtain the Board's permission to abandon the line or discontinue service over it. See 49 U.S.C. 10903; 49 U.S.C. 10502. Otherwise, if a railroad fails or refuses to serve shippers on the line, it violates its common-carrier obligation and may be subject to injunctive relief and damages. See 49 U.S.C. 11701-11704; *GS Roofing Prods. Co.* v. *STB*, 143 F.3d 387, 391 (8th Cir. 1998).

A Board order awarding damages and directing an unwilling rail carrier to provide service can be less advantageous to shippers than operation of the line by a willing railroad. For that reason, the Act authorizes the Board under certain circumstances to force the sale of a line to another carrier that is willing and able to provide the service needed. Under the Act's "feeder line" development provision, the Board may order a railroad to sell a line if the Board finds, as pertinent here, that

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[1] The Act was amended by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (49 U.S.C. 10101 *et seq.*), which created the STB to assume various regulatory functions of the former Interstate Commerce Commission (ICC). Among those functions is implementation of the feeder-line railroad development provision at issue here, which is now codified at 49 U.S.C. 10907.

service to shippers over the line is inadequate. See 49 U.S.C. 10907(b)(1)(A)(i). The feeder-line provision allows the Board to address deteriorating rail service on secondary railroad lines and to preserve those "feeder lines" prior to their total downgrading. See *Caddo Antoine & Little Mo. R.R.* v. *United States*, 95 F.3d 740, 744 (8th Cir. 1996); H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 124 (1980).

If the Board directs the sale of a line under the feeder-line provision and the parties cannot agree on terms, the Board must set the price at no less than the "constitutional minimum value." 49 U.S.C. 10907(b)(1); see *GS Roofing Prods. Co.* v. *STB*, 262 F.3d 767, 771 (8th Cir. 2001). For purposes of a feeder-line sale, the "constitutional minimum value" is the higher of the line's net liquidation value (NLV) (the likely proceeds if the property were sold for non-rail use) or its going-concern value (GCV) (its value as an operating railroad). 49 U.S.C. 10907(b)(2). Although a Board order directing the sale of a line is binding on the seller, the prospective buyer may choose not to proceed if it is unwilling to accept the terms set by the Board. See 49 C.F.R. 1151.2(h).

2. a. In 2000, petitioner sold the bulk of a 76-mile rail line to SF & L Railway, Inc. (SF & L). Pet. App. 7. "The sale was challenged and, finding that SF & L's purpose was to abandon and salvage the line, the STB revoked SF & L's authority to acquire the line and directed that [petitioner] retake possession." *Ibid.* Respondent Keokuk Junction Railway Company (Keokuk), a connecting railroad, then sought authority to provide temporary alternative rail service over the line. *Id.* at 85-86. In opposing Keokuk's request, petitioner assured the Board that it would resume operations over the seg-

ment after reacquiring the line. *Id.* at 86. Petitioner did not resume operations, however, but instead drove away all existing and potential new shippers. *Id.* at 89-92.

b. Keokuk filed an application under the feeder-line provision, asking the Board to require petitioner to sell the line to it. Pet. App. 8. In responding to the application, petitioner took issue with, inter alia, Keokuk's valuation of the line. *Id.* at 11. To establish the value of the track and other materials under an NLV approach, petitioner submitted the analysis of its expert, who calculated the net salvage value of the track based on then-recent steel prices in the spot market. *Ibid.* Keokuk contested the expert's analysis, and the parties proffered a series of submissions intended to document various upward and downward shifts in the price of steel. See *id.* at 15, 41, 54.

3. On October 28, 2004, the Board issued a decision finding that Keokuk had met the statutory criteria for forcing the sale of the line. Pet. App. 83-132. Among its findings, the Board determined that petitioner had refused to provide adequate rail service, and that the sale to Keokuk would likely result in improved service for shippers. *Id.* at 89-92, 98.

The Board then addressed the valuation of the line. With respect to the salvage-value component of the NLV, the Board determined that, given the recent volatility in steel prices and the time that had elapsed since Keokuk filed its application, it would not be appropriate to select a single date for the purpose of identifying the price of steel. See Pet. App. 105-106. Instead, the Board calculated a composite monthly average over 16 months—from April 2003 (when Keokuk's application was filed) through July 2004 (the last month of then-available, verifiable data)—based on industry data regu-

larly collected and published by the United States Geological Survey. *Id.* at 106. The Board found the line's NLV to be $3.9 million. *Id.* at 116.

Petitioner filed a timely petition for reconsideration. See Pet. App. 53. As relevant here, petitioner argued that the Board had failed to adhere to its precedents when it averaged the price of steel over a 16-month period instead of valuing it on the date of the decision. See *id.* at 63, 73. Petitioner tendered evidence of the price of steel as of November 1, 2004 (the date it claimed that it would have chosen to sell the salvageable material if the sale were voluntary), and it urged the Board to use that evidence in calculating the line's NLV. See *id.* at 63.

On February 7, 2005, the Board granted in part and denied in part petitioner's petition for reconsideration. Pet. App. 52-82. The Board reaffirmed its decision to calculate the price of steel using a 16-month average, although it accepted a small adjustment in the data that increased the NLV to approximately $4.2 million. See *id.* at 73-75, 80.

4. Petitioner sought judicial review of the Board's decision in the court of appeals. See Pet. App. 6; 28 U.S.C. 2321(a) and 2342(5). Relying on *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), petitioner argued that the Fifth Amendment required the Board to calculate the value of the railroad line at the spot steel price on the date of the taking. See Pet. App. 26-27 & n.16, 32-33. Petitioner further "contend[ed] that the date of taking in this case was on or about February 7, 2005, and that the STB was required to calculate the value of the line according to market conditions on that date." *Id.* at 33.

The court of appeals affirmed the Board's decision. Pet. App. 1-51. The court held that petitioner had waived its Fifth Amendment challenge to the STB's valuation methodology by failing to raise that argument before the Board. *Id.* at 27 n.16, 33. The court explained that petitioner "did not raise a Fifth Amendment challenge to the STB's valuation methodology in agency proceedings." *Id.* at 27 n.16. The court of appeals further observed that petitioner "did not cite *Kirby Forest* before the STB and, in fact, urged the STB to calculate the market price of steel as of November 1, 2004, the date of the STB's valuation decision, not as of February 7, 2005, the date that the sale of [petitioner's] line to [Keokuk] became final." *Id.* at 33.

The court of appeals also stated that, "[e]ven if [it] were to reach the merits of [petitioner's constitutional] argument," the court "would find it lacking." Pet. App. 33. The court of appeals relied on this Court's statement in *Kirby Forest* that the market value of taken property on the date of appropriation might be an improper measure of just compensation if that value is too difficult to determine or its application would result in manifest injustice. *Id.* at 34 (citing *Kirby Forest*, 467 U.S. at 10 & n.14). In this case, the court of appeals held, the Board's valuation methodology was constitutionally permissible under *Kirby Forest* because (1) the unusual volatility in the steel market made it "too difficult" to pinpoint that commodity's market value, and (2) the inflated prices of steel on the date of final sale and the date of appropriation did not represent fair market value and would result in "manifest injustice." *Ibid.* The court also found that the Board's use of average steel prices "more accurately reflected the line's probable value on the open market than did the artificially

inflated market price of steel as of November 1, 2004," *id.* at 30-31, and it rejected petitioner's argument that the STB's decision to use price averaging was inconsistent with Board precedent, see *id.* at 35-38.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Based on its review of the administrative record, the court of appeals correctly held that petitioner had waived the argument that the Board had violated the Just Compensation Clause by using an average of spot steel prices to calculate the rail line's NLV. See Pet. App. 27 n.16. That waiver determination implicates no novel or important legal issues, and petitioner does not contend that the Seventh Circuit's waiver analysis itself warrants this Court's review. And because petitioner's failure to raise its current arguments before the agency provides an independent basis for affirmance of the court of appeals' judgment, this case would be an unsuitable vehicle for resolution of the underlying constitutional question even if that issue otherwise warranted this Court's review.

Before the STB, petitioner did not argue that the Just Compensation Clause foreclosed averaging, it did not cite *Kirby Forest*, and it did not claim that the Board should use the price of steel on the date of sale in determining the NLV of the line. Instead, petitioner contended that averaging was inconsistent with agency precedent. It argued initially for a valuation based on "recent" steel prices. See Pet. App. 105; Comments in Opp. to Application at 41, Finance Docket No. 34335 (STB filed Oct. 17, 2003) (Doc. No. 209,135). On reconsidera-

tion, petitioner urged the Board to value the line using the spot price of steel on November 1, 2004, two business days after the Board's original decision ordering the sale—a decision that, by its terms, was not scheduled to become effective until November 27, 2004, see Pet. App. 63, 125.

Petitioner cited *Kirby Forest* for the first time in the court of appeals. Petitioner argued on judicial review that the Board was required to use, not "recent" steel prices or prices at the time of the Board's original decision, but rather steel prices as of the closing date for the sale of the line. See Pet. App. 33. Petitioner contends (Pet. 14) that "[i]nherent in any argument challenging [the] Board's valuation of property taken under the Act is in fact a challenge to whether that valuation provides just compensation for the property." Whatever the merits of that contention in other circumstances, it is incorrect here. Petitioner's brief in the court of appeals did not simply advance an additional legal theory in support of a consistent substantive position, but instead advocated a valuation date *different* from the ones that petitioner had urged before the Board. The court of appeals properly concluded that petitioner had waived that argument by not presenting it to the agency. See *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (holding that a reviewing court should not overturn an administrative decision unless the agency erroneously denied an objection presented to it).

2. In any event, the Board's analysis is consistent with this Court's Just Compensation Clause jurisprudence. In most condemnation cases, just compensation is the fair market value of the property on the date it was taken. See, *e.g.*, *United States* v. *564.54 Acres of Land*, 441 U.S. 506, 511-513 (1979). Under that stan-

dard, the owner of condemned property generally is entitled to receive "what a willing buyer would pay in cash to a willing seller" at the time of the taking. *Id.* at 511 (quoting *United States* v. *Miller*, 317 U.S. 369, 374 (1943)). An alternative measure of just compensation may be employed, however, either when "the market value [is] too difficult to find, or when its application would result in manifest injustice to owner or public." *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123 (1950). This Court's decision in *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1 (1984), did not change either the general standard for determining just compensation or the circumstances in which that standard can be supplanted by another formula. See *id.* at 10.

In assessing the constitutional minimum value (*i.e.*, the NLV) of the rail line at issue here, the Board acted in accordance with the foregoing principles. The Board found that the spot price for steel was extremely volatile and unstable during the course of the proceedings before the agency. Pet. App. 30-31. Under those circumstances, the Board "concluded that calculating the statutory constitutional minimum value of the line by averaging the price of steel from April 2003 to July 2004 * * * more accurately reflected the line's probable value on the open market than did the artificially inflated market price of steel as of November 1, 2004." *Ibid.*

The Board's averaging methodology thus was not a departure from the fair-market-value standard for measuring just compensation, but was instead a reasonable approach to determining the price the line would likely have commanded on the open market. At a time when the spot price for delivered steel is fluctuating dramatically from month to month, a willing buyer of a rail line

would not necessarily value the salvageable steel based solely on its spot price on the day of purchase. Rather, such a buyer might be concerned that the spot price would drop before the steel could be salvaged and sold. Similarly, a willing seller would not necessarily relinquish the property based on the current spot steel price if it believed that the price on the day the line was to be sold was aberrationally low. The Board's valuation methodology was therefore fully consistent with the general rule that just compensation for taken property is the fair market value of the property on the day of the taking.[2]

In any event, as the court of appeals explained, this Court's decisions do not establish a per se rule that just compensation must always be measured by the fair market value of the property on the date of the taking. Pet. App. 34. Rather, an alternative measure of just compensation may be used if actual market value on the relevant date is too difficult to ascertain, or if that measure of just compensation would effect "manifest injustice to owner or public." *Kirby Forest*, 467 U.S. at 10 n.14. The court of appeals' affirmance of the Board's decision on that alternative ground, see Pet. App. 34-35, reflects a correct, and entirely factbound, application of this Court's precedents.

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[2] Petitioner argues (Pet. 14) that the court of appeals should have reviewed the Board's valuation of the rail line de novo. The court's application of a narrow and deferential standard of review (see Pet. App. 28) is consistent with decisions of other circuits in comparable cases, see, *e.g.*, *Borough of Columbia* v. *STB*, 342 F.3d 222, 235 (3d Cir. 2003); *GS Roofing Prods. Co.* v. *STB*, 262 F.3d 767, 774 (8th Cir. 2001); *Iowa Terminal R.R.* v. *ICC*, 853 F.2d 965, 969-971 (D.C. Cir. 1988), and petitioner cites no contrary authority.

As the court of appeals explained, "[m]arket fluctuation over the course of proceedings made it 'too difficult' to pinpoint the fair market value of [petitioner's] materials." Pet. App. 34 (quoting *Kirby Forest*, 467 U.S. at 10 n.14). In addition to the difficulties of determining the fair market value of a rail line on a given date during a period of wildly fluctuating commodity prices, use of the spot price of steel on the date of the line's sale would threaten manifest injustice to the public by jeopardizing the operation of the feeder-line program. Under petitioner's theory, an acquiring carrier would be forced to agree to purchase a line at a time when the final price was indeterminate and subject to revision—a risk that many potential acquiring carriers might be unwilling or unable to take.[3]

3. Petitioner argues (Pet. 21-25) that the Board acted arbitrarily and capriciously by departing without explanation from its own prior decisions. The court of appeals correctly rejected that contention. See Pet. App. 35-37. The court explained that the Board precedent on which petitioner relied was inapposite, and that "the STB has averaged prices to account for market fluctuations during feeder line proceedings" in circumstances comparable to those presented here. *Id.* at 36. In any event, petitioner's claim of agency inconsistency is wholly factbound and presents no issue warranting this Court's review.

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[3] Petitioner also objects (Pet. 24-25) to the Board's choice of the precise time period over which to calculate the average price of steel. The court of appeals held that petitioner had waived that challenge, see Pet. App. 38 n.20, and petitioner does not contest that ruling. In any event, this factbound challenge to the details of the Board's valuation methodology raises no issue of recurring legal importance that might warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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